



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

APPEAL NO.47 OF 2017

[formerly Naivasha High Court Appeal No.28 of 2017]

ROYAL OILFIELD LOGISTICS SERVICES AND SUPPLIES LIMITED.....APPELLANT

VERSUS

JOTHAN SAHENYA WAFULA.....RESPONDENT

(Being an appeal from the Ruling and Order of the Resident Magistrates Court

dated 18th July, 2017 in Naivasha CMCC No.435 of 2015

by Hon. Resident magistrate Z. Abdul.)

JUDGEMENT

The facts leading to this appeal relate to the Ruling and Order of Resident Magistrate at Naivasha in CMCC No.435 of 2015 delivered on 18th July, 2017 following application and Notice of Motion filed by the Appellant dated 25th April, 2017 and seeking for orders that there be stay of execution of the decree and a temporary injunction do issue restraining the respondent [the plaintiff] or his auctioneers from executing the decree and that the interlocutory judgment dated 23rd May, 2015 and the judgement dated 24th January, 2017 and all consequential orders and processes attendant thereto be found as defective and be set aside.

Such application and notice of Motion was based on the grounds that the appellant as the defendant had not been served with summons to enter appearance, the plaint or any other document to enable them to enter appearance and file defence. The respondent proceeded to file a false affidavit of service and the judgement that followed from such false documents of service was irregular and should be set aside. The appellant also averred that there was no service of a draft decree for approval or amendment required by law and the respondent therefore proceeded to extract warrants of attachment on 21st April, 2017 and proceeded to proclaim their property which is based on an illegality.

The appellant also submitted before the Learned magistrate that there is a defence to the plaint by the respondent which has triable issues and where the interlocutory judgement is set aside and the defence allowed the appellant shall have a fair chance to be heard.

With regard to the respondent and in reply to the Notice of Motion he averred that the appellant was aware of the suit filed in court as an email was sent to them by court on 11th January, 2017. The appellants advocate was aware that the suit would be filed following a demand letter dated 31st July, 2015 and this was followed by several emails on the same subject matter.

The respondent in reply also avers that the appellant's employee Nelly Ngugi was authorised to receive summons which she did by stamping and signing on the copy of summons and which matters were noted by the process server in the returns filed upon service of summons in the Affidavit of Service. the appellant was aware of the suit but opted not to attend and enter appearance or file any defence. The court proceeded on good grounds and the judgement and decree obtained are regularly and execution should be allowed.

The learned magistrate heard the application, put into account the affidavits and the submissions and in the ruling dated 18th July, 2017 made a finding that the appellant was properly served with summons to enter appearance but failed to attend; the draft defence filed contained mere denials; on whether a draft decree should have been served the court held that this was not mandatory under the provisions of Order 21; and that the court proceeded *ex-parte* upon confirmation that the appellant had been properly served with summons and failed to enter appearance. The firm of Kimani, Kiarie & Associates only filed application and Notice of Motion 33 months after judgement had been delivered and execution had commenced. There was no Notice of Appointment of Advocate filed by such firm which was irregular and unprocedural.

The learned magistrate dismissed the application and Notice of Motion on the grounds that it lacked merit and dismissed the same.

Aggrieved the appellant filed the appeal setting out 9 grounds.

The grounds of Appeal can be summarised as being that the learned magistrate erred in law and in fact when he failed to consider that the appellant had not been properly served with summons to enter appearance in the suit, no hearing notice was served before formal proof in the matter, the appellant's advocates were properly on record, there was a good defence and the finding that the defence comprised of mere denials was in error. Other grounds that the appellant was condemned unheard contrary to the rules of natural justice and the judgement entered was irregular and ought to be set aside.

Both parties addressed the appeal by way of written submissions.

As this is a first appeal, The principles governing the consideration and evaluation and findings of an appeal court have well been established particularly in the case of **Kiruga versus Kiruga & Another [1988 KLR page 348]** where the Court of Appeal held;

An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

The foundation of the appeal is the ruling and orders of the learned magistrate on 18th July, 2017 dismissing the appellant's application to set aside the interlocutory judgment dated 23rd May, 2015 and the judgement dated 24th January, 2017 and the consequential orders therefrom. Such judgement is challenged as being irregular on the grounds that summons to enter appearance were never served upon the appellant.

In the ruling of the trial court, the issue of service of summons upon the appellant was interrogated at length, the Affidavit of Service by Patrick Juma Yuka dated 26th April, 2016 assessed and established that indeed the appellant was duly served with summons but failed to enter appearance and or file a defence or attend at the hearing.

The trial court went further to make a finding that there were email communications between the respondent and the appellant's employee Fredrick Kang'ara Mbote, a director of the appellant and the same person who had sworn an affidavit in support of the application and Notice of Motion subject of this appeal.

Having found that the Summons to Enter Appearance and Complaint were duly served on the appellant in CMCC No.435 of 2015 where they were the defendant, it follows that the default judgment was regularly entered. And where that is the case, it is trite that the court ought to be slow in setting it aside as held in **K-Rep Bank Limited versus Segment Distributors Limited [2017] eKLR**.

In addressing a similar matter as herein the Court of Appeal in **James Kanyiita Nderitu & Another versus Marios Philotas Ghikas & Another [2016] eKLR**, restated the distinction between a regular and irregular default judgement and held that;

From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other. See Mbogo & Another v. Shah (supra), Patel v. E.A. Cargo Handling Services Ltd (1975) EA 75, Chemwolo & Another v. Kubende [1986] KLR 492 and CMC Holdings v. Nzioki [2004] 1 KLR 173).

Having been well satisfied that the appellant at the respondent in CMCC No.435 of 2015 was properly served with summons and failed to enter appearance, the action taken thereafter was lawful and procedural. in the case of **Uncle Sam's Githurai Ltd & Another versus Samuel Mureithi Muriuki & 3 others** the court held as follows;

...the purpose of summons to enter appearance is to bring to the notice of the Defendant of the fact of the institution and to require them to respond to the plaintiff's claim. Where therefore the Defendants on their own motion file appearances and defence to the claim, it becomes superfluous to still insist that summons should be served upon them...

In this regard, the learned magistrate applied the law properly, exercised the required duty properly and made a correct finding. The issues set out for determination while addressing the subject application and Notice of Motion by the Appellant were clear and all established that indeed there was proper service upon the appellant, there was no appearance upon such service and up and until the filing of such application and Notice of Motion, no appearance had been entered. The firm of advocate who moved the court upon judgement and at the execution stage were not properly on record.

The draft defence was interrogated by the learned magistrate. This court has had a chance to read the same draft attached to the Affidavit of Fredrick Kang'ara Mbote as annexure 'FKM4' and indeed, this comprises mere denials to the claims made. The appellant *denies the contents of paragraph ...* while at the same time conceding that where the respondent was injured at work, such resulted from his own negligence or he contributed to the same without any further material.

This court finds no defence to demonstrate whether indeed there are triable issues raised worth setting aside the regular judgment of the learned magistrate.

The trial court made its ruling and orders on good grounds. The discretion within the court mandate was not arbitrary and was judiciously applied in reaching its findings.

Accordingly, the appeal is found without merit and is hereby dismissed with costs to the respondent.

Delivered at Nakuru and dated this 21st day of January, 2019.

M. MBARU

JUDGE.

In the presence of

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